IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 17TH OCTOBER 2007 / 25TH ASWINA 1929

CRL.A.No. 1884 of 2003()

SC.229/2000 OF THE ADDITIONAL SESSIONS JUDGE (ADHOC-II), KASARAGOD

.....

APPELLANT: ACCUSED:

P.G. VASANTHA KUMAR, S/O.SUBBAYYA GOUDA,
PALAR-GUNDIA, BANDADKA.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE;

1. THE EXCISE INSPECTOR,
BADIADKA RANGE.

2. STATE OF KERALA REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1884 OF 2003

Dated this the 17th day of October, 2007.

JUDGMENT

The appellant faced trial before the Additional Sessions Judge (Adhoc-II), Kasaragod in S.C.No.229/2000 for an offence punishable under Section 55 (a) read with Section 55(i) of the Abkari Act. By the impugned judgment, the trial court found the appellant guilty of the above offence and he was convicted thereunder and sentenced to undergo R.I for one year and a fine of Rs. One lakh with default sentence of payment of fine, to undergo R.I for a further period of three months. The appellant challenges the above judgment in this appeal.

2. Prosecution case against the appellant was that he was found in possession of 87 packets of Karnataka made arrack each contained 100 ml on 11.8.1998 in contravention of the provisions of the Abkari Act. Hence, the charge filed against the appellant. To prove the charge, prosecution examined three witnesses and relied on Exts.P1 to P6. MO1 series were also produced. While the appellant was questioned under Section 313 of the Code, he denied the

incriminating circumstances proved against him by the prosecution and had stated that he is innocent and also had stated that the Excise Inspector foisted the case against him with abandoned packets of arrack. The trial court relying on the evidence of PW1 found that the prosecution had succeeded in proving the charge against the appellant and thereby convicted and sentenced him as aforesaid.

3. The learned counsel appearing for the appellant while challenging the judgment of the trial court contends that (a) the trial court had committed a serious error in finding the appellant guilty of the charge only on the evidence of PW1- the Excise Inspector as the two independent witnesses examined were turned hostile to the prosecution. (b) Finding of the trial court that the appellant committed an offence punishable under Section 55(a) of the Abkari Act is not sustainable in law as the prosecution had not proved that the appellant was found in possession of arrack in connection with any import,export, transport or transit of the same. (c) The counsel submits that the punishment awarded against the appellant is excessive.

4. The evidence adduced by PW1, the Excise Inspector, would show that while himself and other excise officials were on patrol duty on the day of the incident and when they reached at a place called Palar-gundia in Badiadka at Kasaragod district, he had seen that the appellant was coming along the road holding a plastic bag in his hand. On stopping him and on verifying the plastic bag, it was revealed that the plastic bag contained 87 packets of Karnataka made arrack each contained 100 ml arrack. Further, the evidence of PW1 would show that on preparation of Ext.P2 mahazar, the plastic bag was seized and three packets of arrack have been taken for analysis in the presence of two independent witnesses and the sample and the other contraband seized were packed, properly sealed and thereafter the appellant was arrested at the spot as per Ext.P1 arrest memo. Further, the evidence of this witness would show that the appellant, the contraband articles and the samples were taken to the excise office and registered a crime against the appellant. The evidence of this witness also would show that the sample taken for analysis was forwarded to the chemical analyst for chemical report and as per Ext.P6 chemical report, it was reported that the sample contained 35.03% ethyl alcohol by volume and the sample analysed is Karnataka made arrack. The

evidence of PW1 has been accepted by the trial court and it had come out in evidence that though Pws 2 and 3 were attestors to Ext.P2 mahazar, they turned hostile to the prosecution. However, these two witnesses admitted their signatures in Ext.P2. Though Pw1 was cross examined at length, there exists no doubt regarding the evidence of PW 1. In the above circumstances the trial court correctly accepted the evidence of PW1. There is no rule or legal bar to prove the prosecution case only on the evidence of official witnesses. Here, the prosecution had succeeded in proving that the appellant was found in possession of 87 packets of Karnataka made arrack. Though the counsel made an attempt before this Court that the sample sent for analysis is not that of the one seized from the appellant, this argument is on the basis of difference in the T.R number shown in Ext.P4 property list. This list contained two numbers i.e., 450 as well as 451. But, it is not stated that, that numbers pertain to the T.R numbers, at the same time, the crime number in Ext.P4 is numbered as 24. In Ext.P6 chemical report, it was recorded as T.R.No.450/1998 and the crime number is also mentioned therein. In the above circumstances, this Court is of the view that evidence of PW1 cannot be doubted regarding seizure of contraband articles from

the appellant. This Court is of the view that the trial court had appreciated the evidence of PW1 correctly and it requires no interference.

5. The next question to be considered in this appeal is whether the trial court is justified in finding that the appellant guilty under Section 55 (a) of the Abkari Act. In this context, the counsel for the appellant submits that as per the principle laid down by this Court in **Surenderan v. Excise Inspector** (2004 (1) KLT 404) and **Sudephan @ Aniyan v. State of Kerala** (2005(2) KLD (Crl) 631), this Court had categorically held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution should plead and establish that possession of the contraband liquor is in connection with any import,export, transport or transit of the same. In this context, evidence of PW1 would only show that when the contraband packets were seized, it was understood that, these packets were made in Karnataka, but the prosecution had not proved any evidence to show that the arrack in question or the contraband in question was imported or transported from Karntaka . No such evidence is also not proved. Even though PW1 had given evidence to that effect, Ext.P2 mahazar would not show that the

packets seized contained any label. It would show that it is made from Karnataka.

6. In the above circumstances, this court is of the view that the prosecution had not proved that the contraband article seized from the appellant is in connection with any import, export, transport or transit. If so, the finding of the trial court that the appellant had committed an offence under Section 55 (a) of the Act Act is not legally sustainable. Hence, the finding and the conviction entered against the appellant under Section 55 (a) are hereby set aside.

7. The next question to be considered is that as this Court accepted the evidence of PW1 and the prosecution evidence regarding possession of the arrack, either Karnataka made or Kerala made, the sample analysed is that of arrack and it contained 35.1% of ethyl alcohol. As per Section 8(1) of the Abkari Act possession of arrack or transporting of the same is an offence under Section 8(2) of the Abkari Act. In the light of the above, this court is of the view that the appellant had committed an offence punishable under Section 8(1) read with 8(2) of the Abkari Act. Looking into that angle, this Court is of the view that the appellant

is liable to be punished in the above provision. Accordingly, the appellant is found guilty under Section 8(1) read with 8(2) of the Act. The next question to be considered in this appeal is what would be the punishment awarded against the appellant. The appellant was found in possession of arrack which is a prohibited liquor in Kerala. Manufacture, import, export, transport, possession and sale of the arrack in any form in Kerala is prohibited and is punishable. If so, the appellant was found in possession of arrack in contravention of the provisions contained in Section 8. The State Government had prohibited dealing of arrack in any form with a purpose and if such offence is committed, it shall be punished properly so as to have a lesson to the abkari offenders. In the above circumstances, this Court is of the view that the appellant shall be severely punished. However, the trial court had now found that at the time of commission of the offence, the appellant was below 20 years and punishment of S.I for one year was already imposed by the trial court. The incident had happened during 1998. Hence, this Court is of the view that the punishment awarded against the appellant by the trial court is sufficient punishment for the offence committed by the appellant. Accordingly, the appellant is found guilty under Section 8(1) read with 8(2) and he is convicted

thereunder and sentenced to undergo S.I for one year and to pay a fine of Rs. One lakh with default of payment of fine to undergo S.I for three months. The appellant is entitled for the benefit under Section 428 of Cr.P.C.

With the above alteration of conviction and sentence, in all other respects, the appeal stands dismissed.

K. THANKAPPAN, JUDGE.

cl